

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
FILED
MAY 31, 1972
S. D. OF N. Y.

CHAIMAN GOTTESMAN, MARNA,
MARTINELLO, and PAUL J. PEYSER

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION and
E. E. du PONT DE NEMOURS &
COMPANY.

Defendants.

Civ. 121-251

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Before:

HON. CHARLES M. METZNER,

District Judge.

New York, March 28, 1972;
2.45 o'clock p.m.
(In Chamber)

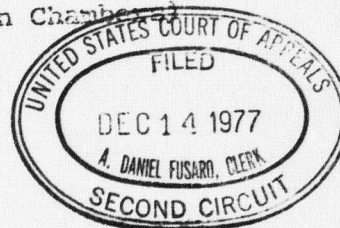
APPEARANCES:

DAVID BRADY, ESQ.,
LEO BRADY, ESQ.,
ARTHUR NETTER, ESQ.,
ABBOTT GOULD, ESQ., and
HENRY L. BAYLES, ESQ.,

Attorneys for Plaintiffs.

EDWARD B. WALLACE, ESQ.,
FRANK H. GORDON, ESQ.,
DANIEL M. GRIFFIN, ESQ.,
HARRIS WEINSTEIN, ESQ.,
IRVING S. SHAPIRO, ESQ., and
GORDON W. SCHALL, ESQ.,

Attorneys for Defendants.



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2 THE COURT: I see that Judge Ryan signed the
3 order on October 5, 1959.

4 MR. BAYLES, I think you asked for this confer-
5 ence.

6 MR. BAYLES: Yes, I did, Judge. I want to
7 thank you for calling the conference at my request.

8 You mentioned the year 1959. I have been in
9 the case ever since then. At the beginning I had
10 various sessions, examinations.

11 I requested this conference because we have
12 been having conferences among the various counsel
13 representing the plaintiffs, and what I am about to
14 propose meets with the approval of general counsel as
15 well as trial counsel.

16 THE COURT: General counsel is Netter &
17 Netter.

18 MR. BAYLES: They have been designated general
19 counsel.

20 THE COURT: And Mr. Brady's old firm were trial
21 counsel.

22 MR. BAYLES: I have general counsel's approval.

23 What I intend to propose, if acceptable, will
24 result in a complete termination of the Gottesman case
25 without the necessity of your Honor making any further

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2 decisions, without there being any necessity for further
3 appeals on the part of anybody in the Gottesman case.

4 If your Honor will bear with me, I want to
5 be perfectly candid as to why I am here today and why
6 I am suggesting this.

7 I think the real reason I have been asked to
8 make this suggestion, or proposal, is because I am
9 senior in service here as far as plaintiffs' counsel is
10 concerned. There was only one other person before
11 me and he has passed away.

12 Back when I was requested to become associated
13 here as counsel for the plaintiff by general counsel
14 we had a case which involved four plaintiffs, including
15 Mattiello and Zuckerman. These are all cases that
16 have been separated and they have all been consolidated
17 in this court. At that time the alleged stockholdings
18 of some people went far back.

19 THE COURT: Mattiello, I ruled, was 1951.

20 MR. BAYLES: They alleged --

21 THE COURT: 1943.

22 MR. BAYLES: They went way back which even
23 encompassed the period of the Government case.

24 We are trustees here for the stockholders of
25 General Motors, the fiduciaries. Your Honor ruled that

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2 neither Mattiello's stockholdings stood up or Zuckerman's
3 stockholdings stood up.

4 THE COURT: She didn't appear for deposition.

5 MR. BAYLES: That's right. We had no control
6 over the attorneys representing these parties, so that
7 left only Gottesman and Tyler, and their stockholdings
8 began in 1950.

9 I never really understood the reason for Rule
10 23, frankly, which says that a derivative suite, when
11 you bring it on behalf of a wronged corporation, in that
12 suit the wronged corporation can only get the benefit
13 of the wrongs accruing from the time the plaintiff stock-
14 holder acquires his share. I could never understand
15 the rationale for that rule but it is a rule and it has
16 to be enforced.

17 THE COURT: If that's the only thing you
18 don't understand in the rules you are lucky.

19 MR. BAYLES: That's the rationale for that
20 rule.

21 It seems to me where the wrong has been com-
22 mitted a derivative suit is permitted to lie and whatever
23 the corporation could obtain should be obtained in that
24 action. That, apparently, is not the law and I know
25 it is not the law.

1 We tried then, after the stockholders were
2 dismissed, to get to join and we made an application
3 to join, I think, including another person as a plaintiff
4 so his stockholdings could go back so we could get
5 the broadest recovery for General Motors if successful.
6 That application was denied.

7 Your Honor granted us a lot of applications as
8 we went along so I am not saying anything in the vein
9 that these were the only decisions.

10 In a question of discovery your Honor limited
11 us, as far as actual damages were concerned, for the
12 period of time when we, the plaintiffs, acquired their
13 stock, which was what the law required you to do.
14 A lengthy discovery proceeded on that basis, and after
15 that action was continued I believe the Schiff case
16 was started, I believe, in 1960 or 1961.

17 THE COURT: 1963.

18 MR. BAYLES: The Schiff case is also a
19 derivative suit and encompasses the allegations contained
20 in the Gottesman case, if not more allegations, but at
21 least that.

22 An application was made, I think, to con-
23 solidate the two cases. I am not sure of this --

24 THE COURT: This was denied and mandamus was
25

requested.

MR. BAYLES: Denied. So we tried the case. The case was tried before your Honor based upon stockholdings in 1951 limited to certain amounts as specified in the record, certain types. It was dismissed. Affirmed. Lots of appeals. There has been an appeal practically from everything here every time there was a decision.

I am, and most of the other counsel are, conscious that there are obligations as fiduciaries here to the stockholders of General Motors. As a matter of fact, the statutory provisions provide that where there has been a finding, an antitrust violation, the law encourages private suits to the extent of giving prima facie weight to the findings, treble damages, and so forth, because they realize that private litigants without funds or the expense would be in trouble if they had to litigate everything. So the statutory provisions are inclined to, at least, not stand in the way but to assist a private litigant if he chooses to assert a private claim for damages where there has already been a finding of antitrust violation.

Now we are through with that phase that your Honor has determined is past appeal. Now we are up

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2 to the balance of the claims in the Gottesman case and
3 here is where I made this suggestion to my other
4 counsel.

5 I suggested to them that all of the remaining
6 counsel claims in the Gottesman case be withdrawn, every-
7 thing, complete. I don't think that this is going to
8 prejudice the stockholders of General Motors by with-
9 drawing the Gottesman balance of claims because the
10 Schiff case encompassed all these things and, as a matter
11 of fact, the Schiff case has stockholdings going back
12 beyond our case. So we won't be trying again a
13 fragmented case with stockholdings from 1950 on rather
14 than from the beginning, whatever limitation would
15 apply.

16 So after talking over with various counsel --
17 as a matter of fact, I think your Honor, at the last
18 conference, suggested the thought -- we felt that the
19 remaining claims might be withdrawn. But I want to be
20 perfectly candid with your Honor and my opposing counsel:

21 I am recommending, or suggesting, a proposal
22 that they be withdrawn, not because there is no merit
23 to them but because I do not think the fragmentary trials,
24 or partial trials, or piecemeal trials, will serve any
25 great purpose. I think it would be detrimental to

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the interests of the stockholders of General Motors more importantly.

So after discussing the matter quite at length, incidentally, with various counsel, my suggestion has been approved by all of them.

I have been authorized to state that the plaintiffs are prepared to withdraw all remaining claims in the Gottesman case.

There is one other thing that is called to my attention. I am not even making this a condition, by the way. What I am going to say is not a condition.

I am also going to suggest to your Honor that we have indicated that the plaintiffs intend to file an application for counsel fees in the Gottesman case.

THE COURT: I have an application from Mr. Lee here.

MR. BAYLES: I think Mr. Lee was working for Mr. Brady at the time and we have a statement in that respect. That application, however, I understand, is being held in abeyance and perhaps we might even have it withdrawn.

THE COURT: Mr. Lee?

MR. BAYLES: That's right. I think he wrote a letter to your Honor. Did he say --

THE COURT: 30 days. Of course, if the case is withdrawn ---

MR. BAYLES: We may discuss this matter with Mr. Lee further.

However, I am suggesting, your Honor, that the application for counsel fees in the Gottesman case be deferred until after we get through the entire matter involving Schiff.

THE COURT: Am I going to live that long?

MR. BAYLES: I hope you will. We have all lived this long, 15 years.

THE COURT: I got married and acquired grandchildren while this was going on.

MR. BAYLES: I did the same thing but I didn't acquire grandchildren. There has been a lot of change in status around here.

There is one other thing I was going to suggest. It is not as a condition, your Honor, but it is a suggestion, and that is that defendants have made application for costs, taxation of costs. I am going to suggest that that application be likewise deferred until after the complete termination of the Schiff case. The reason I am suggesting this is whatever way the chips may go when the Schiff case may determine -- may,

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2 I say -- how your Honor may rule upon the application
3 of costs, counsel fees, in the Gottesman case and the
4 Schiff case.

5 I am trying to avoid piecemeal determinations.
6 More or less, frankly, I am trying to avoid work both
7 on the part of your Honor as well as each of respective
8 counsel.

9 THE COURT: Mr. Gribbon?

10 MR. GRIEBON: Well, I am not too sure I under-
11 stand the full implications of what is being suggested
12 here. Obviously we are anxious to get rid of the
13 Gottesman case. That's not everything, but it has been
14 a long hard row, and anything that will get rid of it
15 seems to us to be in the right direction. If the plain-
16 tiffs' proposition is that the period of time covered
17 by Gottesman on the claims have not yet been adjudicated
18 in Gottesman be tried in Schiff, that doesn't seem to me
19 accomplish very much -- just taking the remaining claims
20 in Gottesman and putting them into Schiff.

21 THE COURT: He says they exist in Schiff.

22 MR. GRIEBON: Exist, perhaps, in a technical
23 sense, but they exist in no greater sense than when your
24 honor denied consolidation. They exist because Schiff
25 purports to cover everything.

THE COURT: I gather that if the plaintiffs withdraw all Gottesman claims it is as though Gottesman doesn't exist, and then we try Schiff, except to the extent that adjudications have been made on Automotive Fabrics & Finishes. That's what it seems to me, the proposal.

They are trying to get advantage of the earlier date on Schiff than they had in Gottesman on the open claims, adopting Mr. Bayles' statement, adopting the statement that Schiff embraces everything that is left in Gottesman. I think that's what the proposal is.

Schiff is a live case.

MR. GRIBBON: Yes.

THE COURT: Do you want to go ahead? We'll have to set up discovery, motions, what-not.

MR. GRIBBON: We do have pending motions in Gottesman which have not been answered and which, if good motions, as we think they are, would take away a big part of Schiff.

THE COURT: That's one of the problems that is on the table. Your motions were filed December 1. There are no answering papers to it. I think at that time we gave Mr. Brady until December 21st to answer, and then Mr. Bayles came along and asked for a 90-day

1 in all, what they are saying, and correct me if I am
2 wrong:
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4 We -- the plaintiffs -- have everything we
5 want in Schiff; we don't need Gottesman, and even if
6 you try Gottesman we are not dropping Schiff, so therefore
7 we want to withdraw from Gottesman, get it out of the
8 way, and let's proceed on Schiff as though it is a new
9 born lawsuit.

10 That, I think, as I indicated before, puts
11 some issues to General Motors and du Pont as to their
12 pending motions in Gottesman, and the effect they might
13 have if they are decided or if they are not decided.

14 MR. WALLACE: The result will be of making
15 the same motions over again in Schiff.

16 THE COURT: I don't know. I think I have
17 correctly summarized it.

18 MR. BAYLES: You have.

19 MR. GRIBBON: I can only read Mr. Bayles'
20 statement on behalf of the plaintiffs as amounting to a
21 concession that they really don't have defenses to these
22 motions we have put up here.

23 THE COURT: They are saying:

24 We never came to grips with your motion
25 because we were working out this proposal.

MR. GRIBBON: Possibly, but it is a curious way for them to behave. They have been thinking about this ever since your decision but they wait until they get our motions.

I do want to think about this, but, offhand --

THE COURT: I would never ask you to give me an answer now.

MR. GRIBBON: It does strike me that we are entitled to a dismissal on the basis of the motions and then we can go on to Schiff.

THE COURT: If that's what you are saying you can say it now or you can say it a week from now. I think that we have clarified this much:

What they are seeking is a disposition of Gottesman with nothing more done in Gottesman except the judgment that has been affirmed on appeal, certiorari denied. From that point we then go on to Schiff. I think it is as bald as that.

MR. BAYLES: Exactly.

MR. WALLACE: We withdraw our motions then?

THE COURT: Yes.

MR. GRIBBON: Particularly, I suppose, they amend their complaint at this date to eliminate all of the causes of action that have not been resolved.

MR. BAYLES: We can do that by stipulation.

THE COURT: This may be part of your negotiations. You want to make sure that you want to get out of Schiff everything you think was disposed of in Gottesman. You may have a problem on that.

I think in our September 27th conference there was an indication that they still thought there was something open on Automotive Fabrics & Finishes. I didn't think so, but I think Mr. Brady indicated that something was open.

MR. GRIBBON: We filed our motions which dealt with that matter in part.

THE COURT: I think you have to do some talking amongst yourselves and then some more talking with Mr. Bayles and Mr. Brady and the rest of the gentlemen. You have an offer on the table, I suppose -- that's what it is called. What you do with it is entirely up to you.

My theory is that I am here for a long, long time. Whether I try Gottesman, Schiff, or Grinnell, or any of the other cases really makes no difference to me.

MR. SHAPIRO: You only have antitrust cases.

THE COURT: I don't know I have been blessed this way. If the Supreme Court reverses Hughes and

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2 sends it back to me --

3 MR. GRIBBON: They granted certiorari.

4 THE COURT: I jumped with glee when I saw
5 that.

6 MR. GRIBBON: Your Honor, could we have 10 to
7 15 minutes right now? We will see what we can get
8 accomplished here and then report back to you in a few
9 minutes to see where we go.

10 THE COURT: Of course.

11 (Short recess.)

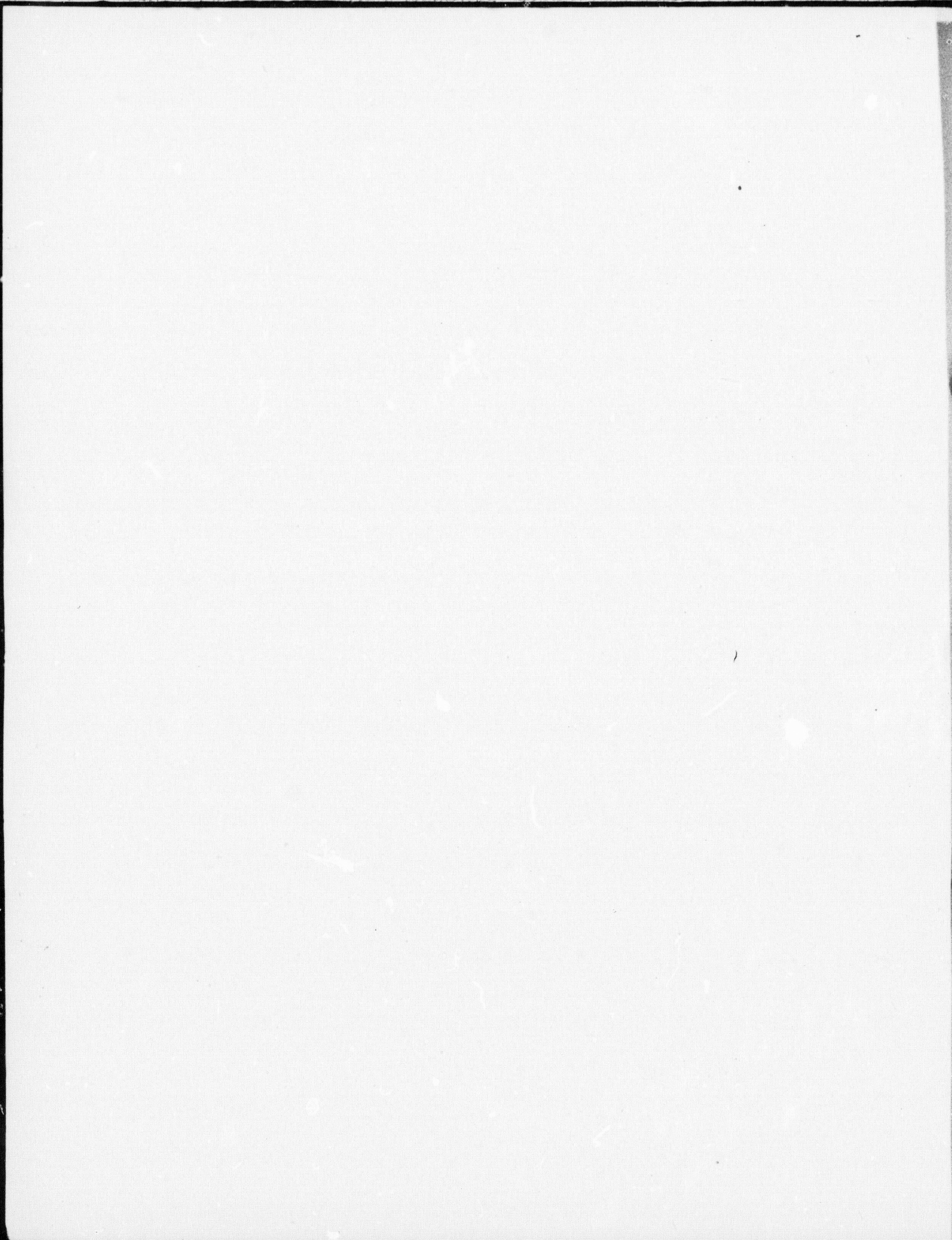
12 MR. GRIBBON: We have talked amongst ourselves,
13 Judge. We have not talked with plaintiffs' lawyers but
14 we have concluded that the proposition has implications
15 that we do want to study further.

16 Our problem really comes down to whether we
17 ought to surrender what we call good, solid motions in
18 Gottesman for what would appear to be a jury trial in
19 Schiff covering the same thing.

20 We do want to consider that.

21 I might say that our view is that if there is
22 to be a disposition of Gottesman at this time we see no
23 reason why the matters, fees, and costs, and everything
24 else, should not be wound up right now.

25 If it meets with your approval, we would like



a few days to consider this, and it may be that we would talk with the plaintiffs to explore it further during that time. If you want to set a date for us to come back --

THE COURT: I will be here right on through the end of June, except for the American Law Institute for a couple of days.

MR. GRIBBON: Shall we give your office a call? I feel certain it won't be next week because of the holidays, and things likethat. We are not going to drag our feet. We will be back to you shortly.

THE COURT: I will be here.

MR. BEADY: I assume Mr. Gribbon will let us know in advance to see if it will be mutually convenient.

THE COURT: Of course.

Good day, gentlemen.

I (we) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

(s) Phil Golden
Official Court Reporter
U. S. District Court

DEPARTMENT OF JUSTICE
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